Supreme Court, U.S.
FILED
DEC 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-734

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ROTHERY STORAGE & VAN CO., INC., *et al.*,
Petitioners,

v.

ATLAS VAN LINES, INC.,
Respondent.

REPLY TO ATLAS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The Atlas opposition to a Writ appears to ask this Court to take as undisputed a critical "free riding" fact question disputed below, to ignore the issues presented, and to ignore large portions of the rationale used by the Circuit Court of Appeals in coming to its conclusions. Such benign neglect would disserve both the objectives of legislative decartelization of the transport industries,[1/] and consistency in the application of the antitrust laws.

1/ Note that a December 22, 1986, Business Week article, p. 50, calls for enhanced antitrust law enforcement to

The pivotal judgment of the Court of Appeals -- that the presence or absence of market power is to be determined solely on the basis of one market share measure, ignoring other relevant record information -- is simply characterized as "correct" in one portion of one sentence on grounds that rule of reason analysis requires a showing of "actual adverse effects on competition" The brief also attempts to avoid the issue by arguing that the finding was "inessential" because the Court below was of the opinion that the horizontal restraints improved the efficiency of the van line. (Opposition, p. 16).

A rule of reason analysis requires examination of anticompetitive potentials

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preserve and further the advantages of legislative "deregulation" of transport. This case presents an instance of transport networkers raising the entry costs of potential entrants, by concerted restraints.

and/or effects, as well as the "reasonable necessity" of the examined restraints to legitimate commercial goals. These separate issues are then linked in the final resolution of reasonableness. The Court of Appeals relied solely on a market share finding for the required determination of anticompetitive potentials and effects. It declined to inquire into actual effects upon competition because it judged that "It is impossible to believe that an agreement to eliminate competition within a group of this size can produce any of the evils of monopoly." (App. 14a) 2/ (Indeed its market share finding contributed to its conclusions on the commercial justification for the restraints. 3/)

2/ Note that the Circuit Court's unambiguous reasoning leads to the conclusion that any per se violation, such as price fixing, involving participants with market shares less than 10% could not produce any of the evils of monopoly.

3/ The Circuit Court went on to argue that "If it is clear that Atlas and its

Thus, the Court of Appeals did not reflect in its opinion or take any account of the evidence summarized on pages 17-20 of the Petition showing the anticompetitive purposes and effects of the horizontal restraints.

The separate statement of Chief Judge Wald, who voted in favor of rehearing this matter en banc, clearly identifies this central failure of analysis -- "... to my knowledge, the Supreme Court has not decided rule of reason cases solely by looking at market shares. Instead, it has looked to the totality of circumstances surrounding a restraint ... (App. 44a).

The Opposition's discussion of FTC v.

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agents by eliminating competition among themselves are not attempting to restrict industry output, then their agreement must be designed to make the conduct of their business more efficient. No third possibility suggests itself." (App. 22a). This logic leads to finding some market efficiency justification even for combinations historicially deemed in the per se category if the conspirators have small market shares.

Indiana Federation of Dentists, 106 S. Ct. 2009 (1986), NCAA v. Board of Regents of University of Oklahoma, 104 S.Ct. 2948 (1984) and General Leaseways v. National Truck Leasing Ass'n., 744 F.2d 588 (7th Cir. 1984) misses the relevant content of these cases and a principal point of this Petition -- which is that data additional to and other than market share can show the presence of significant market power, and the probability or actuality of anti-competitive effect. 4/

The Opposition's attempt to impeach by mere denial the data set out on pages

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4/ Indeed, a market power finding is not strictly necessary in either a rule of reason or per se analysis. In Indiana Dentists, the Court made no finding of market power. It simply found at 457-458 that dentists in certain Indiana counties had supplied less information to requesting insurers when acting in concert than did dentists whose competition had not been constrained by agreement to withhold data. The Court could observe clear interference with ordinary competitive processes, and found no significant countervailing benefits. In this case defendant admits that 20 carrier agents, about

18-20 of the Petition showing parallel action among leading participants household goods industry as to exclusive dealing contracts and restrictive "carrier agent policies" (p. 7), plus an assertion that the Petitioners are unreliable reporters (p. 2), 5/ is very weak.

1/5 of the directly targeted group, ceased all independent competitive interstate operations. Interference with competitive offers is apparent.

The ultimate question is whether competition is or is likely to be restrained. Identifiable market power is an indication of the capacity to restrain competition. Market share data are one, limited and imperfect, type of data bearing on the presence of market power.

5/ The Atlas brief globally accuses the Petitioners of distortion, on page 2, and cites a portion of the Court of Appeals opinion chastising the Petitioners for their use of one of their undisputed fact propositions. (Ap. 23a-24a, n. 9). Petitioners believe that note in the Court's opinion to be unwarranted. Petitioners had in their pleadings below cited materials in addition to the one fact statement identified by the Circuit Court which supported the fact proposition in the brief below, and that one reference to the material undisputed facts was indeed only illustrative of the composite of several. Partially by reason of this

Petitioners cited the specific portions of the record containing these data. Petitioner-cited documents evidencing the exclusive dealing clauses and carrier agent policies of the other leading van lines was entered into the record pursuant to stipulation of the parties. Atlas apparently disagrees as to the interpretation of these data. But it provides this Court no specific basis for its disagreement. Nor, more importantly, does it suggest any reasoned justification for the failure of the Court of Appeals (or for that matter the District Court) to reflect the existence of these materials in analyzing the competitive significance of the restraints imposed in the Atlas - "agent"

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background, Petitioners included in their Petition to this Court abundant cites to record materials. Petitioners believe any balanced comparison of their pleadings with the record below will sustain each and every contention made before all three courts.

horizontal accords. 6/

As to the Circuit Court's fundamen-

6/ As to Atlas' apparent attempt to impeach the market share data set out on pages 18-20 of the Petition, the Petitioners had pointed out to the courts below a top-15 carrier submarket, as an indicator of a long haul intercity submarket in which van lines were dominant. Leading-firm statistics have been compiled regularly by the Interstate Commerce Commission, and were the basis of the leading-firm market share data entered into the record by stipulation. Atlas can hardly claim ignorance of these data. The Opposition 's note 2 reference to "market shares" of the top 15 carriers seems to be an attempt to divert attention from this long-haul submarket. As to the Opposition's note 10 statement that Petitioners have not explained the derivation of their observation that over 70% of the long haul market was substantially foreclosed to the targetted carrier agents, one need only add the cited market shares for those carriers designated as having exclusive dealing and restrictive carrier agent policies in the table on pages 19 and 20 of the Petition. Note further that the Opposition refers to the same Petitoners' Appendix G compilation of data on the practices of other leading van lines as do the Petitioners, in their note 9, though characterizing these data incompletely. (The Opposition asserts that three other leading van lines "welcome" carrier agents without noting that they do so only if those carrier agents conform to extensive, roughly parallel, recently imposed restraints on their competitive operations.)

tal failure to consider whether an allegedly "ancillary" restraint is unnecessarily broad, and thus its failure to apply any form of least restrictive or less restrictive alternative analysis, the Atlas brief incredibly argues that "It is well settled that protection against the erosive effects of such free riding is a prime exemplar of the procompetitive "redeeming virtues" that will justify any restriction upon competition under the rule of reason." (Opposition, p. 18) (emphasis added).

Atlas' brief cites a note in Continental T.V., Inc. v. G.T.E. Sylvania, Inc. 433 U.S. 36, 58, n. 29 (1976). This note is referenced to the text's observation that the Court could not a priori assume that vertical restraints generally are likely to have pernicious anticompetitive effects or lack redeeming virtues, and in relevant part merely adds the observation

that Sylvania's vertical restraints did not appear to be the most or least restrictive imaginable. This brief observation obviously is not an explication of the analytic approach to be taken in rule of reason cases. One of the two cases cited by Atlas which appear to have any relevance to the question posed in this case, American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F. 2d 1230, 1249-50 (3rd Cir. 1975), suggests application of the traditional "reasonably necessary" standard to a potentally anticompetitive restraint. The other, Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 381 (5th Cir. 1977), suggests that the presence of less restrictive alternatives is a factor to be considered in the rule of reason analysis, though not necessarily the decisive factor. 7/ A law review article cited,

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7/ This case references Justice

Pitovsky, The Sylvania case: Antitrust Analysis of Non-Price Vertical Restrictions, 78 Colum. L. Rev. 1, 36-37 clearly suggests use of a "reasonable necessity" standard, in contrast to the carte blanche approval of any restraint urged by Atlas, and to the Circuit Court's explicit refusal to "calibrate degrees of reasonable necessity" (App. 36a)

"Reasonable necessity" can be judged only by determining whether a restraint is required to effectuate a licit goal. If alternatives to the restraint will adequately serve the claimed efficiency (or "contract integration") goal, then the restraint in question obviously is not

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Brennan's observations concerning the appropriateness of rule of reason examination of less restrictive alternatives, in a concurring opinion in White Motor Company v. United States, 372 U.S. 253, 271-2 (1963). The Circuit Court in Kentucky Fried Chicken inferred that the less restrictive alternative analysis was only one part of the total analysis required.

necessary. Thus, the traditional tests of ancillarity cited in Oregon Steam Navigation Co. v. Winsor, 87 U.S. 64, 66,67 (1873) (cited at p. 48 of the Petition), the "reasonable necessity" language of American Motor Inns, Justice Brennan's observations concerning investigation of less restrictive alternative questions in White Motor and the gist of Kreuzer v. American Academy of Periodontology, 735 F. 2d 1479, 1494-5 (D.C. Cir. 1984), are all consistent. The limiting bound on this analysis is that the progenitor of restraints not be required to satisfy an opposing lawyer's most fanciful post-hoc inventions, or meet some theoretical ideal of least conceivable restraint. But this is a limiting factor; not an excuse for ignoring or rejecting the essential question of "reasonable necessity" -- i.e. whether less restrictive alternatives were reasonably available.

The Circuit Court's opinion inescapably presents this Court the issue capsuled by Atlas in its brief -- whether "any restriction" claimed to be related to an efficiency objective, or in Judge Bork's phrase "subordinate and collateral to a separate, legitimate transaction" (app. 29a) will be sustained without examination of "reasonable necessity", or less restrictive alternatives. 8/ This court has never articulated such a standard. As pointed out in the Petition, recent decisions such as Broadcast Music Inc. v. C.B.S., Inc., 441 U.S. 1, 24 (1979) and Arizona v. Maricopa County Medical Society, 457 U.S. 332, 352-54,

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8/ Judge Wald noted this failure of analysis as well, in her note 4 (App. 43a-44a), stating that she understood the panel's position to be that the breadth of the restraint is a matter to be analyzed in determining whether the restraint is ancillary. But one searches the panel's opinion in vain for any such analysis, and indeed the panel explicitly rejected any examination into "degrees of reasonable necessity."

(1982) evidence continuing sensitivity to the need for discriminate analysis of claims of "reasonable necessity". To allow promulgation of the standard articulated by the Circuit Court and defended in naked terms by Atlas in its brief would eviscerate the rule of reason -- specifically the "ancillary restraint" element.

Atlas' third reason offered for declining to issue a writ (pp. 19-20) is not clear. Apparently Atlas is arguing that Judge Bork should not have considered this case as presenting horizontal restraints potentially subject to per se condemnation, and that the Circuit Court's discussion of United States v. Topco Associates, Inc., 405 U.S. 596 (1972), and United States v. Sealy Corp., 388 U.S. 350 (1967), was an "academic detour" merely "setting up and knocking down a straw man".

This apology for the Circuit Court's

opinion cannot be accepted. The Circuit Court clearly recognized horizontal restraints among competitors. It laboriously developed an explicit analytic apparatus for dealing with such restraints. This analytic apparatus was obviously designed for repeated future use: that is, to have precedential effect. Pursuant to that analysis, any horizontal restraint among competitors arguably collateral to some form of contract integration, involving less than 10% of a market, cannot be said to be anticompetitive, will be approved without careful inquiry into reasonable necessity, and thus will be the beneficiary of, in Judge Wald's phrase, "the panel's new per se rule of legality." (App. 42a). To reach this result the Circuit Court consciously and explicitly interpreted, reinterpreted and modified several major Supreme Court precedents, including Broadcast Music, Inc. v. C.B.S.,

441 U.S. 1 (1979) and Northern Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 105 S.Ct. 2613 (1985), as well as Sealy supra, and Topco, supra. The Supreme Court can ignore this appellate Court's pronouncement only if it wishes to allow conflicts with its prior opinions and with other circuits to persist for an indefinite period in the future.

The above disposes, Petitioners trust, of the Opposition's proferred reasons for not granting a writ. We devote a few additional words to the Opposition's treatment of the opinions below.

The Opposition selects portions of the District Court's opinion suggesting "free riding" on the part of the "carrier agents", and suggesting ready availability of alternatives for carrier agents with other van lines. The Petitioners challen-

ged the District Court's "free riding" thesis on appeal, referring to statements of undisputed fact and other record evidence bearing on the issue. 9/ The Appellate Court, presented with these challenges, refined the analysis. But as the Petition points out, the Court of Appeals could find free riding only by taking into

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9/ The District Court erred in its general assertion that the Plaintiffs did not controvert Defendants' proposed statements of material fact, as, Petitioners believe, any detailed examination of the proferred fact statements and comments of the opposing parties will reveal. Petitioners set out relevant disagreements before the Court of Appeals Further, the District Court made numerous fact analysis errors. E. g. it erred factually in attributing to carrier agents use of Atlas "overhead" facilities when operating independently, for reasons set out on pages 22-24 of the Petition, and analytically in supposing that when a "carrier agent" contracted independently with another independent moving firm for origin or destination service on its own independent shipments, and paid that other indepenently owned firm out of its own revenues, it was somehow using a proprietary asset of Atlas'. As noted in the text, the Court of Appeals appears to have avoided these specific errors, for the most part, but made others.

account only one side of an exchange of "intangible" benefits, and failing to take into account that it was dealing with a relationship which relied on price to equilibrate benefits and burdens.

The Atlas brief would elevate "free riding" to the status of a market imperfection of general prevalence justifying any restraint arguably directed at redress. Though "free riding" has become a concept of some importance in contemporary antitrust analysis, in a specific case the existence of free riding potentials, or actual free riding, is a question of fact. The free ridership fact question is apt to be complex and not readily resolvable on cross motions for summary judgment. The Petition points out the failure of the Court of Appeals to address the question properly.

Other failures of the portions of the opinions below cited in the Atlas brief

are noted in the margin. 9/

Lastly, the Petitioners have not

9/ As to the availability of alternatives for carrier agents, see pp. 43-45 of the Petition, and pp. 6-7, infra. The District Court apparently was blinded by the assumption, without any supporting economic analysis, that exclusive dealing contracts were necessary, and thus did not examine their market effects.

The District Court erred in asserting that the Plaintiffs must concede procompetitive effects of the carrier agent policy. Plaintiff's dispute the "free rider" thesis, and note that the motivation and incidents of the policy aimed at potential "carrier agent" competition rather than improving the van line's market offers.

Both courts below noted Senate report language indicating that exclusive dealing contracts in the household goods sector were not presumptively violative of the antitrust laws. Neither court took into account that in doing so Congress rejected antitrust immunity for such contracts, and that this case presents the cumulative effect of adding restraints to those already extant in a previously cartelized industry. Congress could not foresee all the permutations of use of exclusive dealing clauses, including uses of such clauses in combination with other practices, in a newly deregulated framework. It falls to the courts to determine whether in specific situations combinations of practices having preclusive tendencies constitute per se or rule of reason violations.

abandoned any claim of per se violation, as Atlas would have this Court believe. Petitioners assert that the Court of Appeals' analysis precludes proper application of both per se rules and the rule of reason. This is apparent from pp. 26-30 of the Petition, heading number one on page 35 of the Petition, and the text on pp. 35-41 of the Petition.

CONCLUSION

The weaknesses of the opposition to the Petition for Certiorari are, Petitioners submit, a direct consequence of the extreme and indefensible nature of the new antitrust paradigm fabricated by the Court below. The far reaching new theses articulated below require review and revision. The Petitioners urge this Court to issue its Writ.

Respectfully submitted,

C. Jack Pearce